

**THIS DISPOSITION
IS NOT CITABLE AS
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OF THE T.T.A.B.**

Hearing:
July 27, 2000

Paper No. 13
GFR

12/27/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Hubbell Incorporated**

Serial No. 75/**384,473**

Roberta S. Bren and Kathleen Cooney-Porter of Oblon, Spivak, McClelland, Maier & Neustadt for Hubbell Incorporated.

Lisa W. Rosaya, Trademark Examining Attorney, Law Office 112 (**Janice O'Lear**, Managing Attorney).

Before **Seeherman, Bottorff and Rogers**, Administrative Trademark Judges.

Opinion by **Rogers**, Administrative Trademark Judge:

Applicant seeks registration of the mark set forth below for "surge suppression products, namely, surge suppressors, electrical receptacles, modular panels, panels, surge blocks and plug strips," in International Class 9.

SPIKESHIELD

The examining attorney required applicant to enter a disclaimer of exclusive rights in the term "spikeshield." When applicant demurred, the Examining Attorney made the requirement final under Sections 2(e)(1) and 6(a) of the Trademark Act, 15 U.S.C. §§1052(e)(1) and 1056(a), noting that applicant's failure to comply with the requirement provided basis for refusal of registration.

Applicant then filed an appeal traversing the requirement. Briefs were filed and an oral argument was held. We affirm the Examining Attorney's refusal of registration, in the absence of a disclaimer.

The examining attorney contends that "spike" and "shield" are descriptive terms when used in conjunction with applicant's goods; that applicant's merging of the terms into a compound word does not result in a new term that is ambiguous, incongruous or, under any theory, registrable as a mark for applicant's goods; and that the term "spikeshield" is not integrated with the design element of applicant's mark so as to form a unitary composite. To support her position, the Examining Attorney has made of record dictionary definitions of both "spike" and "shield." The Examining Attorney has also made of record results obtained from a search of the Nexis computerized database of publications, showing use of the

terms "spike" and "shield" in conjunction with devices that shield machinery or electronic equipment from power surges or spikes.

Before considering applicant's arguments against the disclaimer requirement, we consider applicant's evidentiary objections. First, applicant has objected to the Examining Attorney's reliance on a definition of the term "spike" retrieved from an on-line dictionary that apparently does not exist in printed form. Second, applicant has objected to the Examining Attorney's report, contained in her brief, of the results of a search of the Office's database of registered and pending marks. The reported results relate to the incidence of registrations for marks containing the word "shield" either on the Supplemental Register or on the Principal Register based upon a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.

Applicant's objection to the on-line dictionary definition of "spike" is not well taken. Applicant asserts that the definition is not a fit subject for judicial notice and was not introduced in accordance with the Office's Internet Usage Policy. The Examining Attorney, however, has not asked the Board to take judicial notice of the on-line dictionary definition of "spike." Rather, the definition was properly introduced as evidence during

examination of the application. While applicant apparently disputes the probative value of an on-line dictionary that does not exist in printed form, introduction of the definition, in the manner in which it was submitted by the Examining Attorney, is contemplated both by this Board's decision in In re Total Quality Group Inc., 51 USPQ2d 1474 (TTAB 1999) and the Office's Internet Usage Policy.

In *Total Quality* the Board expressed reluctance to take judicial notice of an on-line dictionary definition that did not exist in printed form, "after an ex parte appeal has been filed," and noted that such evidence should have been made of record prior to any appeal, so that the "applicant would have had the opportunity to check the reliability of the evidence and/or timely offer rebuttal evidence." *Id.* at 1476. In this case, the Examining Attorney made the evidence of record prior to appeal and provided the applicant with the URL, which allowed applicant to check the definition.¹ Also, applicant has not explained the basis for its assertion that the evidence does not comply with the Office's Internet Usage Policy.²

¹ The Board readily found the definition via the provided URL.

² That policy provides that electronic-only documents are considered original publications. In other words, the fact that an electronic document may not have its origin in a printed original does not bar consideration of the electronic document.

We decline applicant's request to not consider the on-line dictionary definition of "spike." In any event, we note that even were we to grant the request, the Examining Attorney submitted copies of definitions of "spike" from two printed dictionaries covering computer terms, which we find fit subjects for judicial notice. We grant the Examining Attorney's request that we take judicial notice of these definitions.

We find applicant's objection to the Examining Attorney's report on the results of her search of Office records well taken. Accordingly, we have given no consideration to the report that many marks incorporating the term "shield" are registered only on the Supplemental Register or on the Principal Register under Section 2(f) of the Trademark Act.

We are left, then, with the question of whether the Examining Attorney has established the descriptiveness of "spikeshield" when used in conjunction with applicant's goods. In resolving that question, we adopt the point of view of the average or ordinary consumer in the class of prospective purchasers for applicant's goods. See In re Omaha National Corporation, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987). Moreover, the Examining Attorney must have established that "spikeshield" immediately

describes an ingredient, quality, characteristic or feature of applicant's goods or conveys information regarding the nature, function, purpose or use of the goods. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978); and In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

The record includes the following definitions of "spike" and "shield":

spike A momentary, sharp surge in voltage, usually on the mains. Prentice Hall's Illustrated Dictionary of Computing 623 (3rd ed. 1998).

spike A sudden pulse of extra voltage, lasting a fraction of a second, which can cause the computer to crash and damage files or computer components if there is no surge protector on the line. A burst of extra voltage that lasts longer, perhaps several seconds, is called a surge.
<http://www.currents.net/resources/dictionary/definition.phtml?lookup=4784>

shield 3. ...c. *Electronics*. A structure or arrangement of metal plates or mesh designed to protect a piece of electronic equipment from electrostatic or magnetic interference.

Excerpts from noteworthy Nexis references include the following:

...a spike can literally fry your hardware. The surge protection provided by most UPS units will also shield a PC from spikes. WINDOWS Magazine (December 1, 1997).

...A surge-protection strip shields your PC from nasty power spikes.... PC World (June, 1997).

...The shield takes most of the energy from the voltage spike and delivers it to the ground. EC&M Electrical Construction & Maintenance (May, 1996).

...3 new power directors shield PCs from line spikes, surges, noise. PC Week (May 1, 1984).

...incorporates a unique three-stage design to shield computers from high-speed spikes and large power surges. Computer Decisions (March, 1984).

We find the dictionary definitions and Nexis evidence sufficient to establish that both "spike" and "shield" are descriptive terms when used on or in connection with applicant's goods, and have been for many years.³ Further, we agree with the Examining Attorney that the compound word formed by merging the two terms is just as descriptive.

The compound is not vague or ambiguous⁴; it does not present a double entendre or an incongruity. Rather, it would immediately be perceived by consumers as a combination of a noun and an adjective and would immediately inform consumers that the goods are, or

³ We find unpersuasive applicant's argument that because of the plethora of meanings for the term "shield" there is no one meaning clearly applicable to the term as used by applicant. Nor are we persuaded, by the existence of third-party registrations incorporating the term "shield," without disclaimer. Many of the marks referenced by applicant are unitary, so that disclaimer of the "shield" portion would be inappropriate. Also, as the Examining Attorney has observed, only one of the referenced registrations covers goods similar to applicant's goods. Thus, the third-party registrations are simply not probative on the question of descriptiveness of "shield" as used in connection with applicant's goods.

⁴ We are not persuaded otherwise by applicant's argument that its goods do not "spike shields" or "shield spikes."

include, a shield (the noun) of a type that provides protection from electrical spikes (the adjective).

We agree with the Examining Attorney's argument that the absence of any instances of use of the compound word in the Nexis evidence is not determinative of the question of descriptiveness, as it might be of a question of genericness. It is well settled that the fact that an applicant may be the first or only user of a term is not determinative where the term sought to be registered has a merely descriptive connotation. In re Eden Foods Inc., 24 USPQ2d 1757, 1761 (TTAB 1992).

We find that the average consumer of applicant's surge suppressor products, i.e., any purchaser with a need for an electrical receptacle, plug strip or the like to protect or "shield" a piece of electronic equipment from a surge or "spike" in current, will have no need to engage in thought or an exercise in imagination to discern, when faced with applicant's mark and goods, the nature or function of the goods.

Having found that "spikeshield" is descriptive if used on or in connection with applicant's goods, we turn to the question of whether the word is so integrated with the design element of applicant's mark that a unitary composite results and, therefore, entry of a disclaimer is

inappropriate. Applicant contends that the small triangles that appear above each letter "i" in "spikeshield" repeat the initial triangle design that introduces the word portion of the composite. The Examining Attorney, in contrast, asserts that the smaller triangles will be viewed solely as the "dots" over each letter "i" and not as part of a repetitive design. We agree with the Examining Attorney's assessment of the mark. We note that the "initial" triangle is open, while those over each letter "i" are solid. Further, the line emanating from the "base" of the initial triangle and underscoring the word spikeshield does not turn up as it passes underneath each "i," so as to suggest any connection with the triangles above. In short, we do not view the mark as presenting a repetitive design that is integrated with the word.

Decision: The refusal of registration, in the absence of a disclaimer of "spikeshield," is affirmed. In accordance with Trademark Rule 2.142(g), this decision will be set aside and the application will be returned to the Examining Attorney to approve the mark for publication for opposition if applicant, within 30 days of the date of this decision, submits a proper disclaimer of "spikeshield."